



In the February 22, 2002 Award, Judge Moore denied claimant's request for benefits. The Judge found that claimant sustained an accident at work on January 5, 1998, but that the injury was only temporary. Moreover, the Judge determined claimant had failed to make a timely written claim for benefits for that accident. In addressing the timely written claim issue, the Judge determined that respondent was not required to file an accident report with the Division of Workers Compensation and, therefore, the period for making a written claim was not extended to one year.

For the alleged series of accidents through October 23, 1998, the Judge determined claimant sustained repetitive injury through that date. The Judge, however, denied claimant's request for benefits for that injury as claimant failed to provide respondent with timely notice of that accidental injury. In deciding that issue, the Judge determined claimant lacked just cause for failing to provide respondent with notice of the series of accidental injury within 10 days of her leaving work on October 23, 1998.

Claimant contends Judge Moore erred. For the January 5, 1998 accident, claimant argues her testimony is uncontradicted that she was partially disabled immediately after her fall. Accordingly, claimant contends respondent was required to file an accident report with the Division of Workers Compensation, which respondent failed to do until December 1998. Accordingly, claimant argues the time period for making written claim for benefits was extended from 200 days to one year. In the alternative, claimant argues the accident report that claimant prepared for respondent immediately following the January 1998 fall satisfies the written claim requirement under the Workers Compensation Act.

Regarding the alleged series of accidents ending October 23, 1998, claimant argues she was not aware her gradually worsening back condition was caused by a series of mini-traumas or accidents that comprised an accidental injury under the Workers Compensation Act and, therefore, just cause existed to extend the notice period from 10 days to 75 days. In the alternative, claimant argues the notice of accident provided respondent in January 1998 should be sufficient as notice of the series of mini-traumas and accidents that she sustained through October 23, 1998.

Claimant requests the Board to reverse the February 22, 2002 Award and (1) for her January 5, 1998 fall, award her a five percent permanent partial general disability based upon her whole body functional impairment rating, and (2) for her series of accidents ending October 23, 1998, award her permanent partial general disability benefits for a work disability based upon a task loss in the range of 48 to 55 percent and wage loss percentages of 26 percent, 100 percent, 65 percent and 24.5 percent for various periods following October 23, 1998. Claimant also requests temporary total disability benefits for the period from October 24, 1998, through February 1, 1999.

Conversely, respondent and its insurance carrier contend the February 22, 2002 Award should be affirmed. Regarding the January 5, 1998 accident, they argue claimant failed to make timely written claim and also failed to file a timely application for hearing. Regarding the alleged series of accidents, respondent and its insurance carrier argue claimant did not sustain any work-related injury and, in the alternative, failed to provide timely notice of the accidental injury to respondent. They also argue that any award given claimant should be reduced by five to seven percent representing the functional impairment that allegedly existed before the January 1998 accident, and that claimant's task loss is only 13 percent.

The issues before the Board for the January 5, 1998 accident are:

1. Did claimant make timely written claim for that accident?
2. If so, did claimant file a timely application for hearing with the Division of Workers Compensation for the January 1998 accident?
3. What is the nature and extent of claimant's injury and disability?
4. Is claimant entitled to medical benefits for that accident?

The issues before the Board for the alleged series of mini-traumas and accidents through October 23, 1998, are:

5. Did claimant injure her back while continuing to work for respondent in a series of mini-traumas or accidents through claimant's last day with respondent on October 23, 1998, before undergoing disc surgery?
6. If so, did claimant provide respondent with timely notice of accidental injury for the alleged series of accidents?
7. If so, what is the nature and extent of injury and disability from that series of accidents?
8. Is claimant entitled to receive medical benefits for the alleged series of accidents?
9. Is claimant entitled to receive temporary total disability benefits for the period from October 24, 1998, through February 1, 1999?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in 1994. From September 1995 through October 23, 1998, claimant's job was food service supervisor and dietary manager. In that position, claimant was a working supervisor who cooked and served food when the employees under her supervision did not show up for work. Claimant also helped put away supplies twice per week. Claimant described her job as dietary manager, as follows:

Dietary manager would oversee the production and serving of the food to the residents; they would oversee the ordering; the purchasing; the putting away of grocery items; they would also oversee the cooking of the foods. If staff didn't show up for work and you couldn't get another staff member to come in you had to fill in the position that wasn't there. Working closely with State surveyors when they came into the building, overseeing the acceptability of the food to the residents, documenting [sic] on how the people -- if they were having weight losses medication, drug interaction. If person was losing weight you would go down to see if it was something because of a sickness or their health, maybe they don't like what was being served, maybe they were taking a medicine, working with the dietitian, working closely with the director of nursing. You also assist the cook or the dietary aide whenever they were -- if they needed assistance you would put away -- when the truck brought food in they put it in the pantry, you would have to transfer what was kept in the refrigerator area of it, you would move it from the pantry and put it away in the kitchen. The refrigerators were located in the kitchen and the freezer items were kept in the pantry. Breaking down boxes, carrying trash to the dumpster.<sup>1</sup>

2. On January 5, 1998, claimant fell at work and injured her back. At the time of the accident, claimant was escorting a state inspector through the kitchen of respondent's nursing home. The accident occurred at approximately 4:30 p.m. Claimant immediately reported the fall to several supervisors and completed an accident report.

3. After the fall, claimant sought aspirin at the nurses' station. Claimant sat there for approximately 15 to 20 minutes and then retreated to her office where she remained the rest of the day. Normally, claimant left work at approximately 2 p.m., but on the day of her fall claimant was required to stay on premises due to the state inspection. Claimant eventually left work that evening at approximately 6:30 or 7 p.m. Claimant's testimony is uncontradicted that if she were at work during the evening meal at 5 p.m. she would normally help her kitchen staff cook, wash the pots and pans, transfer food items to the steam table and perform other chores. But on the day of the accident, claimant did not assist in the kitchen due to the symptoms that she was experiencing from her fall. Instead, claimant remained in her office and rested.

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<sup>1</sup> Deposition of claimant, October 6, 2000; at pages 36 and 37.

4. The day after the fall claimant hurt worse than the day before and considered staying home. But, because the state inspectors were at the nursing home, claimant reported to work. When she arrived at work, claimant went to the physical therapy room and obtained heat packs for her back. Because her back was hurting, claimant did not perform her usual physical activities that day but, instead, stayed in her office. Due to her back symptoms, claimant did not inventory the pantry, did not assist in the kitchen and did not help lay out or prepare the noon meal, despite having inspectors on the premises. Respondent's protocol required claimant, as the kitchen supervisor, to assist in the kitchen during an inspection in order to help obtain a good survey.

5. The second day after the fall, claimant felt better and she resumed her regular duties, including putting away groceries and helping transfer pans to the steam table.

6. Over a period of time, claimant began having increased back symptoms. Claimant knew her work was aggravating her back but she did not ask to complete an accident report or report that she was experiencing a work-related injury as she was not aware it was appropriate to complete an accident report for performing regular job duties. Claimant testified, as follows:

Q. (Mr. Ostrowski) Did -- at any time prior to surgery did you associate your work activities with the worsening of your back?

A. (Claimant) Well, I don't know. In a way, I guess.

Q. And what do you mean by: In a way?

A. Well, I knew that the -- what I was doing at work was hurting my back but . . .

Q. Did you go in and report at any time prior to surgery that these activities were making your back worse?

A. No.

Q. Did you fill out an accident report for these activities?

A. No, I didn't, because I didn't realize that you could fill out an accident report because your back was hurting because of the things that you were doing at work. It was my job.<sup>2</sup>

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<sup>2</sup> Regular hearing, November 1, 2000; at pages 37 and 38.

7. By April 1998, claimant had symptoms going down into her right leg. For the first time following the January 1998 fall, claimant sought medical treatment for her back and leg symptoms. By October 1998, claimant's symptoms were worse as she had started limping. Claimant was then taken off work and referred to a neurosurgeon, Dr. Ali B. Manguoglu. Claimant saw Dr. Manguoglu in late October 1998 and was unable to provide the doctor with a history of any trauma or specific cause for her back complaints. On November 6, 1998, Dr. Manguoglu operated on claimant's back to repair a ruptured disc.

8. Although claimant was having progressively worsening symptoms, she did not discuss her back problems with respondent's administrator until approximately October 22, 1998, when one of her doctors recommended an MRI. At that time, claimant did not know the source of her back complaints and believed her back problems were possibly from an automobile accident that had occurred more than 20 years earlier when she was in high school. Claimant testified, in part:

Q. (Mr. Ward) And did you tell her [Doris Bryant] that your physical problems involved your back?

A. (Claimant) Yes, I told her that my back -- that they wanted to do, actually, an MRI on my back later that day.

Q. Did you tell her it was due to a motor vehicle accident?

A. I told her I didn't know what it contributed [sic] to. The only thing that I could think of I had been involved in an accident 23 or 24 years earlier.<sup>3</sup>

9. On November 25, 1998, claimant's attorney wrote respondent advising that claimant was seeking workers compensation benefits for her back injury. Respondent received that letter on November 27, 1998.

10. Respondent did not file an accident report with the Division of Workers Compensation until December 1998.

11. On January 22, 1999, claimant filed an application for hearing with the Division of Workers Compensation alleging an accident on December 2, 1997 and/or October 23, 1998, and/or a series between December 2, 1997, and/or October 23, 1998. After discovering an accident report that indicated claimant fell in January 1998 rather than in December 1997, claimant filed an amended application for hearing on November 13, 2000, alleging an accident on or about January 5, 1998, and a series of accidents to October 23, 1998.

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<sup>3</sup> Deposition of claimant, October 6, 2000; at page 59.

12. After recovering from the November 6, 1998 back surgery, claimant returned to work for respondent on approximately February 5, 1999, as a central supply clerk as she could not be accommodated in her former position as the dietary manager. The job of central supply clerk was not within claimant's restrictions from Dr. Manguoglu but the job was modified to accommodate claimant. In August 1999, respondent eliminated that job and fired claimant. Claimant was unemployed until approximately December 9, 1999, when she began working a temporary part-time job for Integrated Health Services as a business manager. Claimant worked that job until approximately April 1, 2000. On approximately April 3, 2000, claimant began working for Clara Barton Hospital as the director of human resources and an administrative assistant. On August 1, 2000, claimant began receiving fringe benefits, including health and dental insurance, from the hospital as part of her compensation package.

13. At her October 2000 deposition, claimant verified the task list prepared by vocational counselor Doug Lindahl, testifying that she had performed the listed tasks and the described physical activities comprising those tasks while performing her former jobs.

14. In December 1999, claimant was evaluated by Dr. Douglas M. Rope, who is board-certified in internal medicine. The doctor is also a Fellow of the American Academy of Disability Evaluating Physicians, which is an organization specializing in medical/legal evaluations and training in the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides). The doctor diagnosed a right sided herniated disc between the fourth and fifth intervertebral levels of the lumbar spine, superimposed upon chronic symptomatic degenerative disease. Dr. Rope noted claimant had sought medical treatment in August 1997 for low back pain on the right side and for pain radiating into the upper half of her right thigh.

15. Dr. Rope concluded claimant's herniated disc was caused by her fall at work, whether that occurred on December 2, 1997, or on January 5, 1998. The doctor also determined claimant's whole body functional impairment under the fourth edition of the AMA Guides was 15 percent, with 20 to 25 percent of that amount preexisting the fall. The doctor did not apportion claimant's functional impairment between the January 1998 fall and the series of mini-traumas and accidents that culminated on October 23, 1998.

16. Considering claimant's work activities as dietary manager following her fall, Dr. Rope concluded that those activities would have caused further extrusion of the ruptured disc. The doctor testified, in part:

Q. (Mr. Ostrowski) What did you understand her job to be after she suffered this fall?

A. (Dr. Rope) Basically she was moving all these cans of food as I detailed in my second letter. It looks like she was moving them in and out of storage and rotating stock. I recall she mentioned a lot of these No. 10 cans which I think are almost a gallon in volume. And she said she'd move a box of four of them at a time. Pretty heavy work.

Q. In relationship to the pre-existing condition and her ultimate need for surgery and the fall followed by her work, what if any contribution was there to her need for surgery from her continued work activities?

A. I think that the continued bending, lifting, puts pressure on what we have to assume is a fragmented disc that she suffered around the time of this December 1997 injury causing further extrusion for the pressure on that L-5 nerve root, increasing the local pain in the back, the limitation of motion, and eventually leading to the neurologic symptoms she had.<sup>4</sup>

The doctor also concluded that claimant's work activities following the fall probably further aggravated her back.

Q. (Mr. Ostrowski) Do you have an opinion as to whether her continued work activities caused further aggravation of her back after she suffered the fall?

A. (Dr. Rope) Yeah, probably.

Q. Probably within a reasonable degree of medical certainty?

A. Oh, yeah. I think if she had been able to get off of her feet she might have, this might have been able to be treated medically. She might not have developed the foot drop. She might not have needed the surgery. She might have got back to that ambient level before the fall where she was able to do this sort of work.<sup>5</sup>

17. Dr. Rope reviewed the task list prepared by Mr. Lindahl and identified 15 of claimant's 31 former work tasks that claimant had lost the ability to perform due to her back injury and the permanent work restrictions that he believed were appropriate.

18. Besides presenting Dr. Rope's testimony, claimant also presented the testimony of Dr. Manguoglu. As indicated above, at their first meeting in October 1998, claimant was unable to pinpoint any specific accident that caused her back complaints. Conversely, claimant told the doctor that she had a long history of back problems, that she was involved

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<sup>4</sup> Deposition of Dr. Douglas M. Rope, October 13, 2000; at pages 12 and 13.

<sup>5</sup> Deposition of Dr. Rope, October 13, 2000; at pages 15 and 16.



in a car accident in high school, that she had experienced back symptoms that waxed and waned, that two months before their visit she began having more problems with her back and that her symptoms had become unbearable approximately three weeks before her October 30, 1998 appointment with the doctor. After reviewing an MRI that claimant had brought with her and after examining claimant, the doctor diagnosed a large ruptured disc between the fourth and fifth lumbar vertebrae on the right side. On November 6, 1998, the doctor performed a lumbar microdiscectomy.

19. At her December 3, 1998 appointment with Dr. Manguoglu, claimant advised the doctor that she had slipped on grease and fell on her back approximately a year before their first visit.

20. Dr. Manguoglu released claimant on January 6, 1999, with restrictions against lifting more than 25 pounds and restrictions against repetitive forward bending and twisting.

21. After reviewing various medical documents regarding claimant's medical condition in 1998 and portions of claimant's testimony in this claim, Dr. Manguoglu concluded there was a good chance that claimant's fall had aggravated her underlying back condition. Moreover, the doctor also concluded claimant's work activities after the fall most likely aggravated her back condition. The doctor testified, in part:

If the records I have reviewed now are true and there is definitely -- if there has been definitely a hard fall on her back, then there is a chance, good chance that this fall can or has aggravated her underlying back condition.<sup>6</sup>

. . .

Again, reviewing her deposition and her job descriptions, I believe that there has been repetitive abuse of her back over the months leading to surgery and which required some lifting, bending, reaching, twisting, type of activities, obviously didn't help her back condition, I believe that they have most likely aggravated her underlying back condition.<sup>7</sup>

22. At his deposition, Dr. Manguoglu was asked to rate claimant's functional impairment. The doctor stated that he was familiar with the fourth edition of the *AMA Guides* and that he would rate claimant's impairment at 20 percent to the whole body. Moreover, the doctor testified that claimant had a five to seven percent whole body functional impairment before the January 1998 fall. The doctor did not apportion claimant's functional impairment

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<sup>6</sup> Deposition of Dr. Ali B. Manguoglu, November 14, 2000; at page 14.

<sup>7</sup> Deposition of Dr. Manguoglu, November 14, 2000; at page 15.

between the January 1998 fall and the series of mini-traumas and accidents that followed the fall.

23. Dr. Manguoglu reviewed the list of former work tasks prepared by Mr. Lindahl and noted that claimant could no longer perform 15 of the 31 tasks.

24. At the request of respondent and its insurance carrier's attorney, board-certified orthopedic surgeon Dr. Terrance C. Tisdale evaluated claimant for purposes of this workers compensation claim. The doctor examined claimant in late November 2000 and diagnosed a herniated nucleus pulposus at L5-S1 and another herniated nucleus pulposus at L4-5, which was status post-microdiscectomy.

25. Dr. Tisdale concluded claimant had a five percent whole body functional impairment before the January 5, 1998 fall, but she now had a 10 percent whole body functional impairment. The doctor utilized the fourth edition of the *AMA Guides*. Noting that it is very hard to determine what an individual's permanent work restrictions should be from a single office visit, the doctor testified that he believed claimant should be restricted from working with her back in a flexed position for extended periods of time, that she avoid repetitive bending and lifting, and that she should have a job that allows her to rotate tasks so as to alternate her posture. The doctor was not asked to apportion the functional impairment between the fall and the series of accidents.

26. At his deposition, Dr. Tisdale was presented with a purported list of claimant's former work tasks.<sup>8</sup> But that list did not contain the physical requirements of any of the purported tasks. The doctor agreed that in determining whether a worker could do a particular activity, he would need to know the physical requirements of the activity. Dr. Tisdale testified, in part:

Q. (Mr. Ostrowski) And in attempting to determine whether or not someone can do a particular activity, when you are sitting in the physician's chair, to really make that determination would you not need to know the actual physical requirements of the job?

A. (Dr. Tisdale) Yeah, you would have to have certainly some better idea. It becomes more evident when you get to the next task list.<sup>9</sup>

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<sup>8</sup> At Dr. Tisdale's deposition, respondent and its insurance carrier's attorney explained how he developed the purported task list, which the Board notes was never verified as being accurate by either claimant or any other witness possessing the requisite knowledge of claimant's former jobs. See pages 17 and 18.

<sup>9</sup> Deposition of Dr. Terrance C. Tisdale, February 6, 2001; at page 14.

**CONCLUSIONS OF LAW**

Based upon the reasons below, the February 22, 2002 Award denying claimant benefits should be affirmed.

For the January 1998 accident, claimant made a timely written claim for workers compensation benefits and filed a timely application for hearing. But claimant failed to prove that she sustained any permanent injury or disability. Accordingly, claimant's request for permanent partial general disability benefits should be denied.

For the series of accidents ending October 23, 1998, claimant failed to provide respondent with timely notice of the accident and, therefore, the request for benefits should be denied.

**January 5, 1998 Accident**

The Board concludes that following the January 5, 1998 accident, claimant was partially disabled from performing her regular job duties for the remainder of that day and the day following. Therefore, respondent was required to file an accident report with the Division of Workers Compensation within 28 days of the accident. Respondent's failure to file that report until December 1998 extended the time period for serving written claim to one year following the accident. See K.S.A. 44-557. Accordingly, the written claim for workers compensation benefits received by respondent on November 27, 1998, was timely.

The Board also concludes that claimant filed a timely application for workers compensation benefits. The Act grants an injured worker at least three years from the date of accident to file an application for hearing with the Division of Workers Compensation. See K.S.A. 44-534. Claimant's applications, which were filed in January 1999 and November 2000, were timely. The argument that respondent's failure to file a timely accident report reduced the period for filing an application for hearing to one year is without merit.

Although entitled to receive benefits for the January 1998 accident, claimant has failed to prove that she sustained permanent injury or permanent impairment from that accidental injury. First, following the January 1998 fall, claimant did not require medical treatment until April 1998. Second, the second day following the fall claimant returned to her regular job duties and was able to perform those duties until her symptoms began to gradually and progressively worsen. Third, the Board is not persuaded that any of the functional impairment ratings provided by the medical experts were directly related to the fall rather than to the series of mini-traumas and accidents that occurred following the fall.

The remaining issues regarding this accident are rendered moot by the above conclusions.

**Series of Mini-Traumas and Accidents Ending October 23, 1998**

The Board affirms the Judge's finding that claimant sustained injury to her back performing her job duties as a dietary manager in a series of mini-traumas and accidents ending October 23, 1998.

The Board, however, concludes claimant did not provide respondent with notice of the series of mini-traumas and accidents until November 27, 1998, which was beyond the 10-day period required by the Workers Compensation Act for providing timely notice. Claimant's testimony is uncontradicted that she did not tell respondent her back symptoms were work-related until after her November 6, 1998 surgery. Claimant's testimony is also uncontradicted she did not report to any supervisor before November 27, 1998, that her work activities were making her back hurt worse.

The Act's notice statute, K.S.A. 44-520, provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Board concludes claimant did not establish just cause to extend the period for reporting the accidental injury from 10 days to 75 days. Accordingly, the notice of the accident and injury provided respondent on November 27, 1998, was not timely. Therefore, the claim for benefits for the back injury sustained in the series of mini-traumas and accidents ending October 23, 1998, should be denied.

The finding that claimant failed to provide respondent with timely notice of the series of mini-traumas and accidents renders the remaining issues moot.

**AWARD**

**WHEREFORE**, for the reasons above, the Board affirms the February 22, 2002 Award entered by Judge Moore.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2002.

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BOARD MEMBER

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**DISSENT**

We respectfully disagree with the majority's conclusion that claimant failed to provide timely notice of the back injury that she sustained at work through October 23, 1998. Claimant did not realize that her progressively worsening symptoms were caused by micro-traumas that comprised a work-related injury for purposes of workers compensation. Instead, claimant attributed her continuing back problems to an old automobile accident and the residual effects from that incident. Indeed, claimant had experienced back symptoms from a degenerative condition in her spine long before the January 1998 fall.

The majority has determined that claimant should have realized that she had sustained a work-related accident and, therefore, should have notified respondent of her back injury within 10 days of October 23, 1998. But, unless a medical expert had informed claimant that her symptoms were due to a work-related injury from mini-traumas sustained at work rather than from her preexisting degenerative back condition, it is unreasonable to expect claimant to possess that knowledge.

By their very nature, mini-traumas are insidious. In this instance, especially in light of her preexisting degenerative back condition and the symptoms that she experienced from that, it would be difficult for claimant to relate her increased back symptoms to her work. Borrowing from an old saying: "You don't know what you don't know."

We find that claimant did have just cause for failing to report her back injury to respondent within 10 days of October 23, 1998. Accordingly, we find that the period for providing respondent with notice of the accidental injury was extended to 75 days. Therefore, the November 25, 1998 letter written to respondent by claimant's attorney was timely notice of the series of mini-traumas and accidents ending October 23, 1998.

This claim is compensable and claimant should be awarded permanent partial general disability benefits for a work disability, along with reasonably necessary medical benefits.

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
Jerry M. Ward, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Director, Division of Workers Compensation